## QUESTION PRESENTED

an employer and a union may be immune
VII liability for establishing and
discriminatory lines of progression
ot justified by business necessity,

e lines of progression were instituted
ter the effective date of Title
I,[1] and
e lines of progression are not a
mponent of a "seniority system" within
e meaning of §703(h).[2]

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ry to petitioners' statement (Pet. at
se presents no question concerning
system "revised" after the effective
le VII. Petitioners have conceded
e purposes of the petition, the lines
on "[came] into existence after Title
ive date." Pet. at 5 n.5.

ternative basis for the decision below
pon by the panel majority but was not
the Fourth Circuit en banc. See
infra.

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United Air Lines, Inc. v. Evan
553 (1977) .....

United Air Lines Inc. v. McMan
192 (1977) .....

United Steelworkers of America
443 U.S. 193 (1979). ....

Youngstown Sheet & Tube Co. v.
Sawyer, 343 U.S. 579 (195

Other Authorities

Section 4(f)(2) of the Age Dis
in Employment Act of 1967
§623(f)(2) .....

Section 703(h) of Title VII of
Civil Rights Act of 1964,
U.S.C. §2000e-2(h) .....

Rule 41(b), Fed. R. App. P. ..

Rule 60(b), Fed. R. Civ. P. .

Murphy, Old Maxims Never Die:
"Plain-Meaning Rule" and
Interpretation in the "M
Federal Courts, 75 Colum
1299 (1975) .....

No. 80-1199

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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THE AMERICAN TOBACCO COMPANY, et al.,

Petitioners,

v.

JOHN PATTERSON, et al.

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AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

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On Writ Of Certiorari To The United States
Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Charges of race and sex discrimination were
d against American[3/] and the Tobacco Workers'

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"American," as used herein, refers collec-
ly to the American Tobacco Company, a Division
merican Brands, Inc., and to American Brands,

ning twelve years,
scrimination cases
nerated three pub-
rict court,[5] two
Circuit,[6] and the
Circuit en banc.[7]
embers -- approxi-
ployees and former
reached retirement
litigation[8] --

nd "Union," as used
ne Tobacco Workers'
182, Tobacco Work-

1974); 11 FEP Cases
977).

5 F.2d 300 (1978).

inted in Pet. App.

intiffs began work-
61. 8 FEP Cases at
on of the tobacco
can in particular,
n, both ... have
pward movement of
hiring." Id. at
noted, 535 F.2d at



findings of the district
firmed by the court of appeals
ch this Court declined to
e following facts. See 8 FEP
. 1974), aff'd in pertinent
(4th Cir.), cert. denied, 429
erican operates two plants in
the "Virginia branch" manufac-
and the "Richmond branch"
bacco. The two branches are
locks apart, are covered by a
rgaining agreement, are served
ive office,[12/] and hire em-
me labor market. Each branch
production departments: the
artment blends and prepares
processing, and the fabrica-

ng continuing disproportionate
nd females in some job class-
e males in others?" Petition
76-46, at 2-3 (1976).

also challenged discriminatory
in this office, known as the
The pending petition for
seek review with respect to

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16/ The fol
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Patterson, et
(4th Cir. 197

17/ Each lin
three jobs.
progression -
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eligible to bid on the vacancy, branc
is applied to determine the successful
FEP Cases at 786.

The district court found that,
the nine lines of progression, the
requirement was discriminatory and w
tified by business necessity. 8 FE
790. The Fourth Circuit expressly a
finding, 535 F.2d at 264-65,[18/] as
district court's findings that "rigid
of job classifications characterized b
as late as 1973, id. at 264, and that
ity system perpetuated past intentio
tion and was not justified by busines
id. at 265.[19/]

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18/ As the Fourth Circuit noted, most
in these lines of progression were in
tion departments. "Since black employ
largely excluded from the fabrication
they held few jobs in most of thes
could not advance despite their seni
at 264.

19/ The Fourth Circuit also affirmed
court's findings of race and sex disc
the selection of supervisors. 535
This issue, which has not been pres
Court in the pending petition for ce
subsequently remanded to the di
by the Fourth Circuit en banc.

rs subsequently filed a motion under
ed. R. Civ. P., asking the district
te its orders and dismiss the com-
basis of this Court's decision in,
ternational Brotherhood of Teamsters
tes, 431 U.S. 324 (1977).[20] On
he district court's denial of this
ority of the Fourth Circuit panel
nent part, that §703(h) of Title VII
e American and the Union any protec-
ility for the discriminatory effects
of progression because those lines
of a "seniority system." 586 F.2d
ehearing en banc, the majority did
question but affirmed on the ground
f the lines of progression were
t of a seniority system, §703(h) has

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ion also sought dismissal of the
the basis of the decisions in
nes, Inc. v. Evans, 431 U.S. 553
Hazelwood School District v. United
S. 299 (1977). The Fourth Circuit
med the district court's denial of
the Evans issue and remanded the
sue for further consideration.
-19. Neither of these issues is
he pending petition for certiorari.

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"conclusively demonstrates that C
the immunity accorded seniority sy
to run only to those systems in
time of Title VII's effective dat
to routine post-Act applications
Id. In Franks, the Court conc
thrust of the section is directe
what is and what is not an illeg
practice in instances in whi
operation of a seniority system
perpetuating the effects of disc
ing prior to the effective date
U.S. at 761. Mr. Justice Powel
Justice Rehnquist, agreed with t
"the 'thrust' of that section is
seniority plans in existence on t
of Title VII." 424 U.S. at 79
part and dissenting in part);
(Burger, C.J., agreeing generally
Powell).22/ In Teamsters, t
concluded that "the congressio
that Title VII should not ou

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22/ In Franks, the Court rever
ruling that §703(h) barred an aw
seniority relief.

sting seniority lists and thereby destroy or er down the vested seniority rights of employ- simply because their employer had engaged in crimination prior to the passage of the Act." U.S. at 353.[23/]

In both Franks and Teamsters, the Court ex- ustively reviewed available indicia of congres- onal intent, and determined that the purpose of 03(h) was to protect incumbent workers who had sted seniority rights when Title VII went into fect. The Court found that Title VII's effect on niority systems was prospective and not retro- ective:

> The initial bill reported by the House Judiciary Committee as HR 7152 and passed by the full House on February 10, 1964, did not contain §703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congres-

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/ Mr. Justice Marshall, joined by Mr. Justice ennan, would have construed §703(h) as not otecting seniority sytems that perpetuate even e-Act discrimination. 431 U.S. at 384-85 oncurring in part and dissenting in part).

morandum stated:
ffect on establish-
effect is prospec-
" 110 Cong. Rec.
rk also placed in
Justice Department
VII which stated:
at Title VII would
seniority. This
VII would have no
ts existing at the
, at 7207.

(emphasis added)

gain reviewed the
of H.R. 7152 on
as well as the
lum and the Justice
tle VII would have
isting at the time
350-51. The Court

s were made before
tle VII, they are
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solve the ambigui-
ed version of HR
g. Rec. 11935-11937

purported "plain meaning" of the statute should control in the face of countervailing clearly expressed legislative purpose and history.[25/] This is particularly true with respect to labor practices legislation. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).[26/] Indeed, the Court has consistently construed the §703(h) exceptions to Title VII's prohibition of employ-

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25/ "'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."'" Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting United States v. American Trucking Ass'ns, 310 U.S. 531, 543-44 (1940). See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975).

26/ See 313 U.S. 185-86:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize.

ment discrimination to effectuate the broad purposes of the Act and the command of specific legislative history. See Griggs v. Duke Power Co., supra, 401 U.S. at 433-36; Franks, supra; Teamsters, supra.

Petitioners attack the Clark-Case and Justice Department statements specifically cited and relied upon by the Court in Franks and Teamsters. Pet. at 13-15. However, the weight to be given these statements was an issue specifically briefed by the parties and decided by the Court in Franks.[27/] The Court in Teamsters characterized these statements as "authoritative indicators" of the purpose of §703(h). 431 U.S. at 352.[28/]

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27/ See, e.g., Brief for Petitioners, No. 74-728, at 25-31 (1975); Brief for Respondent Bowman Transportation Co., No. 74-728, at 7-13 (1975); Brief for Respondent United Steelworkers of America and for the AFL-CIO as Amici Curiae, No. 74-728, at 10-22 (1975); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, No. 74-728, at 18 (1975).

28/ The Court observed that:

> Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. Bipartisan captains were

The Fourth Circuit, therefore, correctl applied Teamsters and Franks, and no need arise to reconsider their analysis of §703(h).[29] Congress intended to enact a comprehensive pro

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28/ continued

> selected for each title of the Civil Right Act by the leading proponents of the Act i both parties. They were responsible fo explaining their title in detail, defendin it, and leading discussion on it.

Teamsters, supra, 431 U.S. at 351 n.35 (citation ommited). See Griggs, supra, 401 U.S. at 434

29/ Contrary to petitioners' suggestion, Pet. a 16-17, the Court has not disavowed its analysis o the purpose and history of §703(h). In Teamsters in the context of a discussion of how the govern ment had proved a post-Act pattern of discrimina tory hiring, assignment, transfer, and promotio polices, the Court stated that the section "doe not distinguish between perpetuation of pre- an post- Act discrimination," and that holdin the seniority system unlawful for perpetuation o post-Act discrimination "would in no way enlarg the relief to be awarded." 431 U.S. at 348 n.30. Subsequently, the Court clarified the scop of §703(h). Id. at 350-53. In United Air Lines Inc. v. Evans, 431 U.S. 553, 560 (1977), the Cour characterized as "too narrow" a reading of §703(h "having no application to attacks based on act occurring after 1965," but nevertheless conclude that "[t]he statute does not foreclose attacks o the current operation of seniority systems whic are subject to challenge as discriminatory." I

spective prohibition of employment discrimina
while protecting certain incumbent emplo
with vested bona fide seniority rights at the
Title VII was enacted. It did not sanction
all time an exception which could be applie
thwart "[t]he primary purpose of Title VII ...
assure equality of employment opportunities an
eliminate those discriminatory practices
devices which have fostered racially strati
job environments to the disadvantage of mino
citizens.'" Teamsters, 431 U.S. at 348, quo

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29/ continued

any event, the Fourth Circuit en banc affi
the district court's application of Evans to
case (Pet. App. 12-13), and the pending peti
for certiorari does not seek review of this is
Trans World Airlines, Inc. v. Hardison, 432
63, 81-82 (1977), says no more about senio
systems than that they "are afforded spe
treatment under Title VII itself" in a case w
the seniority system was neither intention
discriminatory nor discriminatory in operat

Neither Alexander v. Aero Lodge 735,
F.2d 1364 (6th Cir. 1977), cert. denied, 436
946 (1978), nor Hameed v. Iron Workers Local
24 FEP Cases 352 (8th Cir. 1980), discusses ei
the purpose or the history of §703(h). Th
cases simply do not address the question prese
here.

McDonnell Douglas Corp. v. Green, 411 U.S. 800 (1973).[30/]

II.

THE RESULT REACHED BY THE FOURTH CIR BANC IS ALSO SUPPORTED BY THE REASO THE PANEL MAJORITY, WHICH CORRECTLY HE THE LINES OF PROGRESSION ARE NOT PA "SENIORITY SYSTEM" WITHIN THE MEA §703(h).

When American and the Union insti posting and bidding procedure for most 1968, they established an exception for nine traditionally segregated "lines of p sion." 8 FEP Cases at 786. When a vacancy

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30/ This objective is not "illogical." 8. Nor is §703(h) so construed "direct trary" to United Steelworkers of Ame Weber, 443 U.S. 193, 204 (1979). Pet. a By parity of reasoning, the repeal of Ti would accord the greatest immunity to em and thus would further encourage voluntar pliance. Congress, however, chose otherwi is the prospect of enforcement of Tit guarantees, as this Court has recognized "'provide[s] the spur or catalyst'" for vo compliance. See Albemarle Paper Co. v. Moo U.S. 405, 417-18 (1975), quoting United St N.L. Industries, Inc., 479 F.2d 354, 3 Cir. 1973) (back pay liability); Weber, 4 at 204 (voluntary affirmative action progr prohibited by Title VII).

in a job within such a line, only emp
have held a specified lower-level job w
line are eligible to bid on the vaca
requirement of experience within a lin
gression operates as a prerequisite
application of the seniority system:
limited number of employees who sat
prerequisite and are therefore eligible
the vacancy, branch seniority is a
determine the successful bidder. Id. §
supra.

The district court found that, in
nine lines of progression, the experienc
ment was not justified by business nec
perpetuated the job segregation created
tioners' prior discrimination. 8 FEP
790. Thus, under Griggs, the court
concluded that these requirements viol
VII. The Fourth Circuit affirmed this f
conclusion, 535 F.2d at 264-65, and t
denied certiorari, 429 U.S. 920.

On appeal from the district court
quent denial of the motion to vacate i
the Fourth Circuit panel majority (Judg
and Butzner) held, inter alia, that §7
not provide American and the Union any
from liability for the discriminatory

the lines of progression because th
not part of a "seniority system." 58
On rehearing en banc, the majority
lips, Chief Judge Haynsworth, an
recognized that there was "conside
for this "possible alternative ba
sion,"[31/] but they found it un
decide the question because of thei
§703(h) has no application to p
seniority systems. Pet. App. 8-9
Winter and Butzner concurred in thi
en banc majority opinion but also re
prior panel opinion. Id. at 21.

It is clear from the Court's
in California Brewers Association v
U.S. 598 (1980), that this alternat
the Fourth Circuit's decision is di

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31/ Prior to the rehearing en b
repeatedly represented to the lowe
neither job nor line seniority
advancement in the lines of prog
e.g., Joint Reply Brief of American,
1263, at 18 (4th Cir. 1975) ("e
through the lines of progression b
wide seniority, not date of entry in
progression"); Joint Petition of
Rehearing, Nos. 75-1259-1263, at
1976) ("job seniority is not used" i
progression).

California Brewers this Court hel
old requirement" of 45 weeks
temporary employee for entry i
employee seniority track was a
"seniority system" within the me
The Court stated that,

> The 45 week rule d
> significantly from comm
> concepts of "seniority."
> an educational standard,
> physical test, or a stan
> effect to subjectivity.
> criteria, but like any "s
> the 45-week requirement fo
> of employment.
>
> Moreover, the rule d
> the operation of the basi
> lished by the Agreement,
> employment longevity wi
> benefits.

444 U.S. at 609-10.

Here, by contrast, eligibi
jobs within a line of progress
whatsoever to do with an emplo
at the company, or at any bra
department, or in any job. "
labor relations, 'seniority'
connotes length of employment

Brewers, supra, 444 U.S.
there is no requirement that
year, a week, or even a day
so long as the employee "ha
tant textile dryer operator,
to bid on vacancies in the t
classification; so long as
perienced" as a catcher, he
bid on vacancies in the ex
fication. 8 FEP Cases at
experience requirement does
length of employment," Cal
U.S. at 610, it "depart[s]
commonly accepted concepts of
609.

This requirement also pl
operation of the basic syst
Under the basic system in th
vast majority of jobs are ope
employees and are awarded t
The better jobs in the six li
issue, however, are excluded
exercise his or her seniority
those jobs, an employee mus
non-seniority experience re
lower courts found to be an
necessary barrier to advanc
female employees. As the F

nized, "[s]ince black empl
excluded from the fabrica
held few jobs in most of th
advance <u>despite their senio</u>
(emphasis added).

As the Court cautioned
§703(h) must not be interp

> risks swallowing up
> broad prohibition c
> dures and tests" th
> affect members of t
> Act protects. Sig
> be afforded employers
> differing seniority
> freedom must not be
> the ambit of §703(h)
> depart fundamentally
> notions concerning the
> a seniority system,
> rules are dubbed "se
> have some nexus to
> concededly operates
> iority. There can be
> that a threshold requ
> seniority track tha
> educational prereq
> part of a "seniorit
> intendment of §703(h).

444 U.S. at 608-09.

The job experience p
the educational prerequisi

Brewers, departs si
accepted concepts o
artificial and unnece
opportunities for blac
part of any "senior
§703(h). Accordingly,
concluded that it viol

NO EXCEPTIONAL C
MEAL REVIEW OF T
LOCUTORY DECISION.

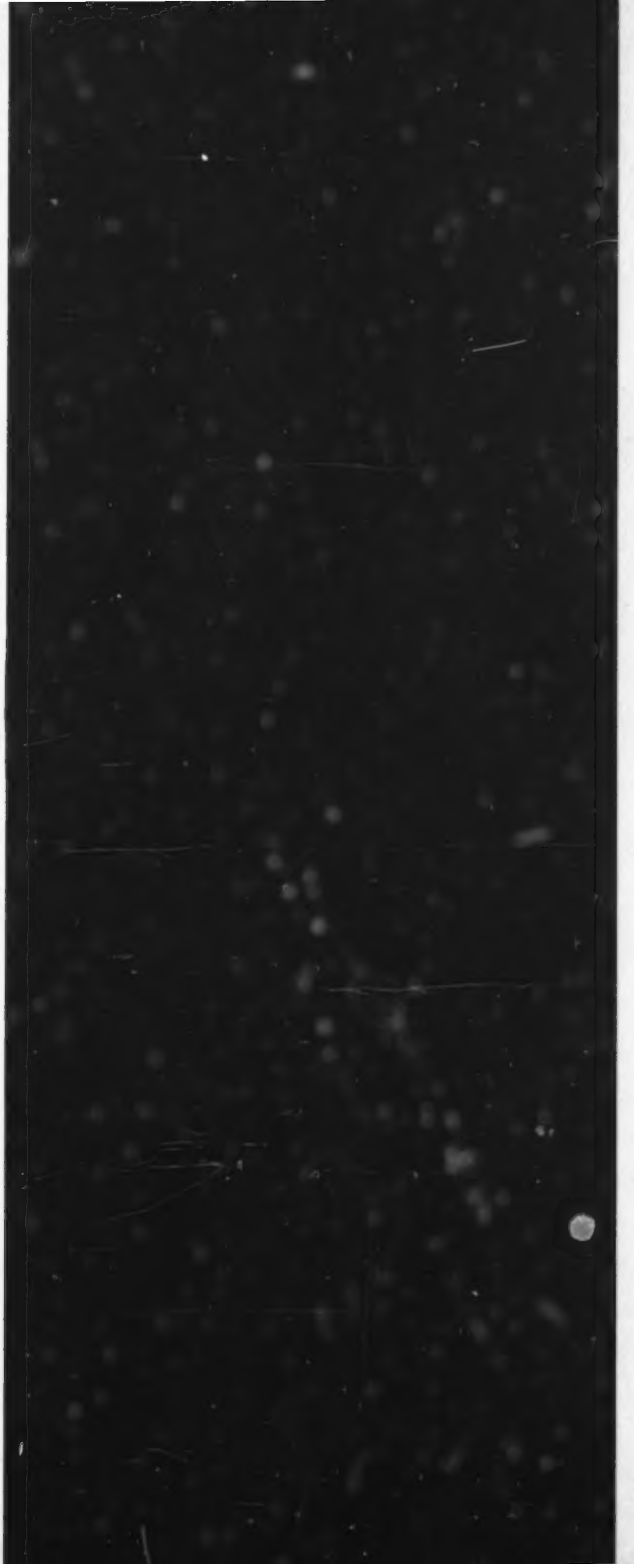
As a rule, this
of certiorari to rev
decision which, like t
decision here, remand
court for further fa
tions. Brotherhoo
Enginemen v. Bangor &
(per curiam). In suc
"of itself alone furni
the denial" of the pet
Co. v. Wolf Bros. & Co.

The Fourth Circui
cases to the district
series of potentially

issues. See pp.
American's branch se
protected by §703(h
in Teamsters, supra
there "special qua
supervisory positio
appropriate statist
prima facie case wi
under Hazelwood, su
there rebuttal evide
show nondiscriminat
visory appointments
13-19. These issue
by the district c
entire non-craft,
over 240 job classi
well as the employee
8 FEP Cases at 791
presented by the pe
only six lines of
contains only two
See Pet. App. 32 n.
dissenting); 8 FEP C



The Court
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American Con
& K.W. Ry., 14
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U.S. 97, 11

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pending this
See p. 4 n.1

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1981